79-300

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-500

APPEAL NO. 1

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

-against-

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

(Action No. 1)

INLAND CREDIT CORPORATION,

Respondent,

-against-

EDWINA RAGER,

Petitioner.

(Action No. 2)

APPEAL NO. 2

INLAND CREDIT CORPORATION,

Respondent,

-against-

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners' Reply Brief is respectfully submitted in view of several misleading references of law and fact contained in Respondents' Brief in Opposition to the Petition for Writ of Certiorari herein.

I

The cases cited in Respondents' Brief in opposition to the Petition for a Writ of Certiorari (*Link v. Wabash Railroad Company,* 370 U.S. 626, rehearing denied, 371 U.S. 873, and *Windsor v. McVeigh,* 73 US 274, 278) are not only completely distinguishable on the facts and the applicable law, but are in direct accord with Petitioners' contention that the grossly arbitrary dismissal or the cause of action, with prejudice and on the merits, violated Petitioners' right to due process of law.

In *Link v. Wabash Railroad Co., supra,* there was a marked pattern of inaction and dilatoriness extending over a period of six years after institution of the action, totally distinguishable

from the multiplicity of legal proceedings forced upon the Petitioners at bar to vindicate their right to a jury trial, to Discovery procedures, to the right of consolidation, to preliminary injunction, and to ancillary applications for stay of the trial in connection therewith both at the trial level and in the appellate courts of New York.

In addition thereto, Petitioners' incapacity to proceed to trial on June 15, 1978, a fact undisputed both by the trial court and the Respondents plainly established that the unavoidable delay in proceeding to trial "was due to inability fostered neither by . . . (petitioners') own conduct nor by circumstances within its control. (*Societe Internationale v. Rogers,* 357 U.S. 196, 211; *Link v. Wabash Railroad Co., supra,* at p. 636).

As posited in *Link,* 370 US at 633, the seminal issue applicable under the facts and circumstances at bar is: *"Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the Court's discretion."*

In Windsor v. McVeigh, 93 US 274, at p. 277, cited in Respondents Brief, p. 12, the Court enunciated the principle fittingly applicable at bar:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Again, Respondents misleadingly represent to the Court that "petitioners' contentions find no basis in New York law," citing *Miller et al. v. Hainzl, et al.,* 5 App. Div. 2d 764 (1st Dept., 1958) (Resp. Br. pp. 18-19).

The *Miller* case is completely distinguishable, principally by the fact that the dismissal for neglect to prosecute in that case was *not* on the merits, as here, and was in basic accord with *New York's Civil Practice Law and Rule 3216*, namely, that a dismissal for want of prosecution is not on the merits, under the order specifies otherwise.

Moreover, in striking contrast to the multiplicity of pre-trial legal proceedings and appeals forced upon petitioners at bar to hurdle the barrier of Respondents' deliberate resistance to Petitioners' elemental rights of trial—the *Miller* case presented an opposite situation showing a plainly dilatory prosecution of an action begun in 1952 and finally dismissed in 1957 upon facts clearly demonstrating "that the plaintiff took the calculated risk of dismissal after every reasonable opportunity was given to him to proceed with the trial."

II

The Respondents disingenuously state to the Court as follows: "On January 21, 1977, petitioners requested and were granted an adjournment of trial, peremptorily, to May 9th 1977***" (p. 8).

We respectfully submit, in reply, that the adjournment was *sua sponte*, at the Court's own instance and request; it was not based on Petitioners' application. Secondly, the adjournment to May 9, 1977 was not "peremptorily," as the Court records would conclusively confirm. Finally, the adjournment from January 21, 1977 to May 9, 1977 was without any objection whatsoever on the part of the Respondents.

Respondents' misleading representation to the Court that "petitioners have failed to state a single instance in which the trial justice evidenced any prejudice or bias whatsoever, except to point to his adverse rulings" (p. 23) is conclusively con-

tradicted by the consistent pattern of extraordinary rulings of bias and prejudice fully set out in the Petition herein, at pp. 45-49.

Particularly revealing of the trial court's attitude "manifesting a closed mind" against Petitioners (*United States v. Grinnell Corp.* 384 U.S. 563, 583) is the fact that whereas, on June 15, 1978, the court specifically severed the Civil Court action (Action No. 2 of *Appeal No. 1*) and remanded it for a jury trial, including the Petitioners' counterclaims therein, and although definitively declaring as follows: "I am sending the case back to the Civil Court, the summary judgment. *I should really dismiss that* because you told me Mrs. Rager is ill. *I will give you a chance to present her.* The equity case is dismissed." (Appendix, p. 59a)—the trial judge nevertheless, on September 1, 1978, inexplicably reversed his position, as to *Appeal No. 2* herein, by declaring as follows:

> "Since the allegations in the Supreme Court action, which were the same as the counterclaims and defenses alleged in the answer in the summary proceeding were dismissed with prejudice, *they may no longer be relied upon in that proceeding either as a defense or as a counterclaim."* (!) (Appendix, p. 6a).

In net result, Petitioners' causes of action have been dismissed "with prejudice and on the merits," without a trial and without reasonable opportunity to be heard, even though the record of proceedings in the state court conclusively negate any suggestion or imputation whatsoever that the delay of trial was fostered by Petitioners' own conduct or by circumstances within their control.

On this record of grossly arbitrary and capricious action by the state court, we respectfully submit that Petitioners have been totally deprived of that "fundamental fairness shocking to the universal sense of justice" violative of the Due Process

Clause of the Constitution of the United States. (*Kinsella v. United States,* 361 U.S. 234, 246; *Guardian Assurance Co. v. Quintana,* 227 U.S. 100).

In *Henry v. Mississippi,* 379 US 443, the Court stated:

> "* * * we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question. Cf. *Lovell, v. City of Griffin,* 303 U.S. 444, 450. As Mr. Justice Holmes said:
>
> > "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail . . . . Whether the right was denied or given due recognition by the [state court] . . . is a question as to which the plaintiffs are entitled to invoke our judgment." *Love v. Griffith,* 266 U.S. 32, 33-34."
>
> Only last Term, we reaffirmed this principle, holding that a state appellate court's refusal, on the ground of mootness, to consider a federal claim, did not preclude our independent determination of the question of mootness; that is itself a question of federal law which this Court must ultimately decide. *Liner v. Jafco, Inc.,* 375 U.S. 301. These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest."

In *Amer. Ry. Exp. Co. v. Levee,* 263 US 19, the Court held:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill v. Grand Lodge Knights of Pythias,* 225 U.S. 246."

In *Hurtado v. California,* 110 U.S. 516 (1884), the Court noted that the due process clause of the Constitution extends to "all the powers of government, legislative as well as executive and judicial." There, the Court noted that:

> "* * *arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions."

In sum, the decision of the State Court below rested on no adequate state ground. The dismissal of petitioners' causes of action "with prejudice and on the merits," was totally "without any fair or substantial support" whatever, and was clearly contrary to the judicial precedents. (*Ward v. Love County,* 253 US 17 (1910). In *Ward,* the Court stated:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. *Union Pacific R. R. Co. v. Public Service Commission,* 248 U.S. 67; *Leathe v. Thomas,* 207 U.S. 93, 99; *Vandalia R. R. Co. v. South Bend, ibid.* 359, 367; *Gaar, Scott & Co. v. Shannon,* 223 U.S. 468; *Creswill v. Knights of Pythias,* 225 U.S. 246, 261; *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157, 164. And see *Jefferson Branch Bank v. Skelly,* 1 Black, 436, 443; *Huntington v. Attrill,* 146 U.S. 657, 683-684; *Boyd v. Thayer,* 143 U.S. 135, 180; *Carter v. Texas,* 177 U.S. 442, 447. Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. *Terre Haute & Indianapolis R. R. Co. v. Indiana,* 194 U.S. 579, 589. With this qualification, it is true that a

judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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October 31, 1979